



STATE OF NEVADA
COMMISSION ON ETHICS
<http://ethics.nv.gov>

NOTICE OF PUBLIC MEETING

NAME OF ORGANIZATION: NEVADA COMMISSION ON ETHICS
DATE & TIME OF MEETING: Wednesday, September 10, 2014 at 10:00 a.m.
PLACE OF MEETING: This meeting will be held at the following location:

**Grant Sawyer State Building
Room 4412
555 E. Washington Avenue
Las Vegas, NV 89101**

Members of the public may attend any open session at the above location.

The open session of this public meeting will be available via the Internet at
<https://www.leg.state.nv.us/App/Calendar/A/>

AGENDA

NOTES:

- Two or more agenda items may be combined for consideration.
- At any time, an agenda item may be taken out of order, removed, or delayed.
- Public comment will be accepted at the beginning of the open session and again before the conclusion of the open session of the meeting. Comment and/or testimony by the public may be limited to three (3) minutes. No action may be taken on any matter referred to in remarks made as public comment.

CLOSED SESSIONS:

These matters are exempt from the provisions of NRS Chapter 241, the Open Meeting Law.

*	A. Closed Session for discussion and consideration of a proposed Stipulation concerning Third-Party Request for Opinion No. 14-17C regarding David Olsen, City Attorney, Boulder City , submitted pursuant to NRS 281A.440(2).
*	B. Closed session pursuant to NRS 281A.440(8) to consider a Pre-Panel Motion concerning Third-Party Request for Opinion 14-43C , submitted pursuant to NRS 281A.440(2).

OPEN SESSIONS:

	1. Call to Order , Roll Call, and Pledge of Allegiance to the Flag.
	2. Open Session for Public Comment. Comment and/or testimony by any member of the public will be limited to three (3) minutes. No action will be taken under this agenda item.
	3. Open Session for presentation and discussion of the procedure to consider allegations of misconduct or professional competence of an employee of the Commission.
For Possible Action	4. Open Session for consideration and approval of a proposed Stipulation concerning Third-Party Request for Opinion No. 14-17C regarding David Olsen, City Attorney, Boulder City , submitted pursuant to NRS 281A.440(2).
	5. Open Session for report by Executive Director and Commission Counsel on agency status and operations.
	6. Open Session for Commissioner comments on matters including, without limitation, future agenda items, upcoming meeting dates and meeting procedures.
	7. Open Session for Public Comment. Comment and/or testimony by any member of the public will be limited to three (3) minutes. No action will be taken under this agenda item.
	8. Adjournment.

***A meeting or hearing held by the Commission pursuant to NRS 281A.440 to receive information or evidence regarding the conduct of a public officer or employee, and deliberations of the Commission regarding such a public officer or employee, are exempt from the provisions of NRS Chapter 241, known as The Open Meeting Law. As a result, these agenda items, or any portion of them, may be heard in closed session.**

NOTES:

- ❖ The Commission is pleased to make reasonable accommodations for any member of the public who has a disability and wishes to attend the meeting. If special arrangements for the meeting are necessary, please notify the Nevada Commission on Ethics, in writing at 704 W. Nye Lane, Ste. 204, Carson City, Nevada 89703; via email at ncoe@ethics.nv.gov or call 775-687-5469 as far in advance as possible.
- ❖ To request an advance copy of the supporting materials for any open session of this meeting, contact Executive Director Caren Cafferata-Jenkins, Esq. at ncoe@ethics.nv.gov or call 775-687-5469.
- ❖ This Agenda and supporting materials are posted and are available not later than the 3rd working day before the meeting at the Commission's office, 704 W. Nye Lane, Ste. 204, Carson City, Nevada, or on the Commission's website at www.ethics.nv.gov. A copy also will be available at the meeting location on the meeting day.

This Notice of Public Meeting and Agenda was posted in compliance with NRS 241.020 before 9:00 a.m. on the third working day before the meeting at the following locations:

- Nevada Commission on Ethics, 704 W. Nye Lane, Suite 204, Carson City
- Nevada Commission on Ethics' website: <http://ethics.nv.gov>
- Nevada Public Notice Website: <http://notice.nv.gov>
- State Library & Archives Building, 100 North Stewart Street, Carson City
- Blasdel Building, 209 E. Musser Street, Carson City
- Washoe County Administration Building, 1001 East 9th Street, Reno
- Grant Sawyer State Office Building, 555 E. Washington Ave., Las Vegas



STATE OF NEVADA
COMMISSION ON ETHICS
 704 W. Nye Lane, Suite 204
 Carson City, Nevada 89703
 (775) 687-5469 • Fax (775) 687-1279
<http://ethics.nv.gov>

In the Matter of the Request for Opinion
 Concerning the Conduct of **David R. Olsen**,
 City Attorney, City of Boulder City, State of
 Nevada

Request for Opinion No.: 14-17C

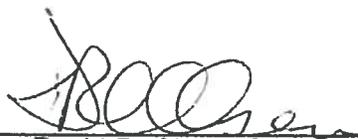
 Public Officer. /

WAIVER OF PANEL PROCEEDING/DETERMINATION AND CONFIDENTIALITY



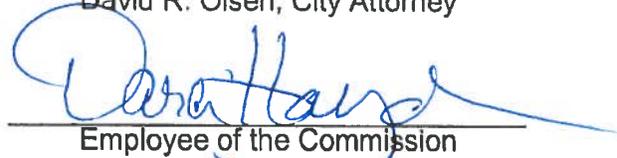
I, David R. Olsen, the Subject of the above referenced Third-Party Request for Opinion ("RFO"), affirm that I have read the provisions of NRS 281A.440 and hereby freely and voluntarily waive my rights to an investigatory panel proceeding and/or a panel determination pursuant to NRS 281A.440(3), (4) and (5), and do not object, and submit to the jurisdiction of the Nevada Commission on Ethics ("Commission") to render an opinion in this matter. I further voluntarily waive my right to require the Commission to maintain confidentiality of the RFO and all related information pursuant to NRS 281A.440(8).

Dated: 08-05-2014



 David R. Olsen, City Attorney

Date Received: 8/11/14



 Employee of the Commission



STATE OF NEVADA
BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Third-Party
Request for Opinion Concerning
the Conduct of **David R. Olsen**,
City Attorney, Boulder City,
State of Nevada,

Request for Opinion No.: **14-17C**

Subject. /

NOTICE OF HEARING

PLEASE TAKE NOTICE, the Nevada Commission on Ethics ("Commission") will consider a **Proposed Stipulated Agreement** regarding the allegations submitted in Third Party Request for Opinion No. 14-17C at the following date, time and location:

Wednesday, September 10, 2014

2:00 p.m.

(or as soon thereafter as the Commission is able to hear the matter)

**Grant Sawyer State Building
Room 4412
555 E. Washington Avenue
Las Vegas, NV 89101**

If the Proposed Stipulated Agreement is approved, it will serve as the final Opinion in this matter. If the Proposed Stipulated Agreement is not approved, the Commission will issue an Amended Notice of Hearing setting the date, time and location for a hearing to consider the matter.

DATED: September 3, 2014

/s/ Yvonne M. Nevarez-Goodson
Yvonne M. Nevarez-Goodson, Esq.
Commission Counsel

CERTIFICATE OF SERVICE

I certify that I am an employee of the Nevada Commission on Ethics and that on this day in Carson City, Nevada, I transmitted a true and correct copy of the **NOTICE OF HEARING** in Request for Opinion No. 14-17C, via email, addressed to the parties and interested persons as follows:

Jacob Reynolds
Hutchison & Steffen, LLC
10080 West Alta Drive, Ste. 200
Las Vegas, NV 89145

Email: jreynolds@hutchlegal.com

Thomas W. Finn
750 Grayhawk Drive
Dayton, NV 89403-8779

Email: tfinn101@aol.com

Caren Cafferata-Jenkins
Executive Director
Nevada Commission on Ethics
704 W. Nye Lane, Suite 204
Carson City, Nevada 89703

Email: cjenkins@ethics.nv.gov

Jill C. Davis, Esq.
Associate Counsel
Nevada Commission on Ethics
704 W. Nye Lane, Suite 204
Carson City, Nevada 89703

Email: jilldavis@ethics.nv.gov

Dated: September 3, 2014



Employee, Nevada Commission on
Ethics

FEB 25 2014

COMMISSION ON ETHICS

NEVADA COMMISSION ON ETHICS
THIRD-PARTY REQUEST FOR OPINION

NRS 281A.440(2)

14-17 C

1. Provide the following information for the public officer or employee you allege violated the Nevada Ethics in Government Law, NRS Chapter 281A: *(If you allege that more than one public officer or employee has violated the law, use a separate form for each individual.)*

NAME: <small>(Last, First)</small>	David Olsen	TITLE OF PUBLIC OFFICE: <small>(Position: e.g. city manager)</small>	City Attorney
PUBLIC ENTITY: <small>(Name of the entity employing this position: e.g. the City of XYZ)</small>	City of Boulder City		
ADDRESS: <small>(Street number and name)</small>	401 California Avenue	CITY, STATE, ZIP CODE	Boulder City, NV 89005
TELEPHONE:	Work: 702-293-9264	Other: (Home, cell) 702-308-5880	E-MAIL: dolsen@bcnv.org

2. Describe in specific detail the public officer's or employee's conduct that you allege violated NRS Chapter 281A. *(You must include specific facts and circumstances to support your allegation: times, places, and the name and position of each person involved.)*

Check here if additional pages are attached.

As the City Attorney for Boulder City, one of David Olsen's responsibilities is to supervise and coordinate the defense of civil lawsuits filed against the city. Boulder City participates in the Nevada Public Agency Insurance Pool/Public Agency Compensation Trust (POOL/PACT). Therefore, legal representation of Boulder City is provided by the POOL/PACT when the city is served with civil suits. David Olsen is the father of Brian Olsen, who was arrested on March 20, 2010 by Boulder City Police Officer Aaron Johnson and Henderson Police Detective Wayne Nichols. After the Clark County District Attorney's Office refused to prosecute the case due to insufficient evidence, Brian Olsen filed a civil action in the United States District Court, District of Nevada, against the City of Henderson and Boulder City for civil rights violations, specifically, false arrest, intentional infliction of emotional distress, false imprisonment and malicious prosecution. As attached Exhibit 2 indicates, City Attorney David Olsen states in his Affidavit that he, "was retained as the expert witness in Olsen v. City of Henderson, et. al., case number 2:12-cv-00543-JCM-PAL." In the final statement of his affidavit, City Attorney David Olsen states, "The Plaintiff's arrest by the Defendants was made without a warrant and without probable cause." Boulder City Attorney David Olsen's flagrant dismissal of Nevada's Ethics in Government Laws is an affront to Boulder City taxpayers and all Nevada citizens. He is supervising the defense of his son's lawsuit against his employer (Boulder City) while serving as his son's "expert witness" in the lawsuit. This is a flagrant violation of the public trust.

3. Is the alleged conduct the subject of any action currently pending before another administrative or judicial body? If yes, describe:

Yes. A complaint was also sent to the Nevada Bar Association on this date.

4. What provisions of NRS Chapter 281A are relevant to the conduct alleged? Please check all that apply.

	Statute	Essence of Statute:
<input checked="" type="checkbox"/>	NRS 281A.020(1)	Failing to hold public office as a public trust; failing to avoid conflicts between public and private interests.
<input type="checkbox"/>	NRS 281A.400(1)	Seeking or accepting any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties.
<input checked="" type="checkbox"/>	NRS 281A.400(2)	Using his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person.
<input type="checkbox"/>	NRS 281A.400(3)	Participating as an agent of government in the negotiation or execution of a contract between the government and any business entity in which he has a significant pecuniary interest.

<input type="checkbox"/>	NRS 281A.400(4)	Accepting any salary, retainer, augmentation, expense allowance or other compensation from any private source for the performance of his duties as a public officer or employee.
<input checked="" type="checkbox"/>	NRS 281A.400(5)	Acquiring, through his public duties or relationships, any information which by law or practice is not at the time available to people generally, and using the information to further the pecuniary interests of himself or any other person or business entity.
<input type="checkbox"/>	NRS 281A.400(6)	Suppressing any governmental report or other document because it might tend to affect unfavorably his pecuniary interests.
<input checked="" type="checkbox"/>	NRS 281A.400(7)	Using governmental time, property, equipment or other facility to benefit his personal or financial interest. (Some exceptions apply).
<input type="checkbox"/>	NRS 281A.400(8)	A State Legislator using governmental time, property, equipment or other facility for a nongovernmental purpose or for the private benefit of himself or any other person, or requiring or authorizing a legislative employee, while on duty, to perform personal services or assist in a private activity. (Some exceptions apply).
<input type="checkbox"/>	NRS 281A.400(9)	Attempting to benefit his personal or financial interest through the influence of a subordinate.
<input type="checkbox"/>	NRS 281A.400(10)	Seeking other employment or contracts through the use of his official position.
<input type="checkbox"/>	NRS 281A.410	Failing to file a disclosure of representation and counseling of a private person before public agency.
<input type="checkbox"/>	NRS 281A.420(1)	Failing to sufficiently disclose a conflict of interest.
<input checked="" type="checkbox"/>	NRS 281A.420(3)	Failing to abstain from acting on a matter in which abstention is required.
<input type="checkbox"/>	NRS 281A.430/530	Engaging in government contracts in which public officer or employee has a significant pecuniary interest.
<input type="checkbox"/>	NRS 281A.500	Failing to timely file an ethical acknowledgment.
<input type="checkbox"/>	NRS 281A.510	Accepting or receiving an improper honorarium.
<input type="checkbox"/>	NRS 281A.520	Requesting or otherwise causing a governmental entity to incur an expense or make an expenditure to support or oppose a ballot question or candidate during the relevant timeframe.
<input type="checkbox"/>	NRS 281A.550	Failing to honor the applicable "cooling off" period after leaving public service.

5. Identify all persons who have knowledge of the facts and circumstances you have described, as well as the nature of the testimony the person will provide. Check here if additional pages are attached.

NAME and TITLE: (Person #1)	David Fraser, City Manager		
ADDRESS:	401 California Avenue	CITY, STATE, ZIP	Boulder City, NV 89005
TELEPHONE:	Work: 702-293-9202	Other: (Home, cell)	E-MAIL: dfraser@bcnv.org
NATURE OF TESTIMONY:	Direct knowledge of City Attorney Dave Olsen's involvement, supervision and intent to appear as an "expert witness" in his son's (Brian Olsen) lawsuit against Boulder City.		
NAME and TITLE: (Person #2)	Tami McKay, Deputy City Clerk		
ADDRESS:	401 California Avenue	CITY, STATE, ZIP	Boulder City, NV 89005
TELEPHONE:	Work: 702-293-9209	Other: (Home, cell)	E-MAIL: tmckay@bcnv.org
NATURE OF TESTIMONY:	As the person who notarized City Attorney Dave Olsen's Affidavit, Ms. McKay has direct knowledge of Olsen's use of her time at work to further his involvement as his son's "expert witness." Her testimony will support a violation of NRS 281A.400(7).		

6. YOU MUST SUBMIT EVIDENCE TO SUPPORT YOUR ALLEGATIONS PURSUANT TO NRS 281A.440(2)(b)(2).

Attach all documents or items you believe provide credible evidence to support your allegations. [NAC 281A.435\(3\)](#) defines credible evidence as any reliable and competent form of proof provided by witnesses, records, documents, exhibits, minutes, agendas, videotapes, photographs, concrete objects, or other similar items that would reasonably support the allegations made. A newspaper article or other media report will not support your allegations if it is offered by itself.

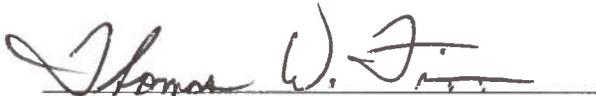
State the total number of additional pages attached (including evidence) 28.

7. REQUESTER'S INFORMATION:

YOUR NAME:	Thomas W. Finn		
YOUR ADDRESS:	P.O. Box 687	CITY, STATE, ZIP:	Dayton, NV 89403
YOUR TELEPHONE:	Day: 702-994-9355	Evening:	E-MAIL: tfinn101@aol.com

By my signature below, I affirm that the facts set forth in this document and all of its attachments are true and correct to the best of my knowledge and belief. I am willing to provide sworn testimony if necessary regarding these allegations.

I acknowledge that, pursuant to NRS 281A.440(8) and NAC 281A.255(3), this Request for Opinion, the materials submitted in support of the allegations, and the Commission's investigation are confidential until the Commission's Investigatory Panel renders its determination, unless the Subject of the allegations authorizes their release.



Signature:

February 24, 2014

Date:

Thomas W. Finn

Print Name:

You must submit an original and two copies of this form bearing your signature, and three copies of the attachments to:

**Executive Director
Nevada Commission on Ethics
704 W. Nye Lane, Suite 204
Carson City, Nevada 89703**



Forms submitted by facsimile will not be considered as properly filed with the Commission.

[NAC 281A.255\(3\)](#)

TELEPHONE REQUESTS FOR OPINION ARE NOT ACCEPTED.

<input type="checkbox"/>	NRS 281A.400(4)	Accepting any salary, retainer, augmentation, expense allowance or other compensation from any private source for the performance of his duties as a public officer or employee.
<input type="checkbox"/>	NRS 281A.400(5)	Acquiring, through his public duties or relationships, any information which by law or practice is not at the time available to people generally, and using the information to further the pecuniary interests of himself or any other person or business entity.
<input type="checkbox"/>	NRS 281A.400(6)	Suppressing any governmental report or other document because it might tend to affect unfavorably his pecuniary interests.
<input type="checkbox"/>	NRS 281A.400(7)	Using governmental time, property, equipment or other facility to benefit his personal or financial interest. (Some exceptions apply).
<input type="checkbox"/>	NRS 281A.400(8)	A State Legislator using governmental time, property, equipment or other facility for a nongovernmental purpose or for the private benefit of himself or any other person, or requiring or authorizing a legislative employee, while on duty, to perform personal services or assist in a private activity. (Some exceptions apply).
<input type="checkbox"/>	NRS 281A.400(9)	Attempting to benefit his personal or financial interest through the influence of a subordinate.
<input type="checkbox"/>	NRS 281A.400(10)	Seeking other employment or contracts through the use of his official position.
<input type="checkbox"/>	NRS 281A.410	Failing to file a disclosure of representation and counseling of a private person before public agency.
<input type="checkbox"/>	NRS 281A.420(1)	Failing to sufficiently disclose a conflict of interest.
<input type="checkbox"/>	NRS 281A.420(3)	Failing to abstain from acting on a matter in which abstention is required.
<input type="checkbox"/>	NRS 281A.430/530	Engaging in government contracts in which public officer or employee has a significant pecuniary interest.
<input type="checkbox"/>	NRS 281A.500	Failing to timely file an ethical acknowledgment.
<input type="checkbox"/>	NRS 281A.510	Accepting or receiving an improper honorarium.
<input type="checkbox"/>	NRS 281A.520	Requesting or otherwise causing a governmental entity to incur an expense or make an expenditure to support or oppose a ballot question or candidate during the relevant timeframe.
<input type="checkbox"/>	NRS 281A.550	Failing to honor the applicable "cooling off" period after leaving public service.

5. Identify all persons who have knowledge of the facts and circumstances you have described, as well as the nature of the testimony the person will provide. Check here if additional pages are attached.

NAME and TITLE: (Person #1)	Wayne Carlson, Executive Director, Nevada POOL/PACT		
ADDRESS:	201 South Roop St., Suite 102	CITY, STATE, ZIP	Carson City, NV 89701
TELEPHONE:	Work: 775-885-7475	Other: (Home, cell)	E-MAIL: waynecarlson@poolpact.c
NATURE OF TESTIMONY:	As the Executive Director of the POOL/PACT, Mr. Carlson can provide insight into the highly confidential relationship between the defense attorneys his agency provides to member agencies, and the city attorneys of each respective agency. His testimony will provide crystal clear evidence of Boulder City Attorney Dave Olsen's conflict of interest in this matter.		
NAME and TITLE: (Person #2)			
ADDRESS:		CITY, STATE, ZIP	
TELEPHONE:	Work:	Other: (Home, cell)	E-MAIL:
NATURE OF TESTIMONY:			

1 CAL J. POTTER, III, ESQ.
Nevada Bar No. 1988
2 POTTER LAW OFFICES
1125 Shadow Lane
3 Las Vegas, Nevada 89102
Ph: (702) 385-1954
4 Fax: (702) 385-9081
Attorney for Plaintiff
5

6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
8

9 BRIAN OLSEN,
10 Plaintiff,
11

CASE NO.: 2:12-cv-00543-JCM-PAL

v.

12 CITY OF HENDERSON, a political
13 subdivision of the STATE OF NEVADA;
DETECTIVE NICHOLS, individually and in
14 his capacity as a police officer employed by the
City of Henderson Police Department; CITY OF
15 BOULDER CITY, a political subdivision of the
STATE OF NEVADA, OFFICER AARON
16 JOHNSON, individually and in his capacity as a
police officer employed by Boulder City, Officers
17 IV through X, inclusive and JOHN DOES I through
X, inclusive.

18 Defendants.
19

20 **PLAINTIFF'S RESPONSE AND OPPOSITION TO DEFENDANTS BOULDER CITY**
21 **AND OFFICER JOHNSON'S MOTION FOR SUMMARY JUDGMENT**

22 COMES NOW, Plaintiff, BRIAN OLSEN, by and through his attorney of record, CAL J.
23 POTTER, III, ESQ., and hereby files his Response and Opposition to Defendants Boulder City and
24 Officer Johnson's Motion for Summary Judgment.

25 ...
26 ...
27 ...
28 ...

1 This Opposition is made and based upon the attached Memorandum of Points and
2 Authorities, the papers and pleadings on file herein, and the argument of counsel at the hearing in
3 this matter.

4 DATED this 23rd day of August, 2013.

5 POTTER LAW OFFICES

6 By /s/ Cal J. Potter, III, Esq.
7 CAL J. POTTER, III, ESQ.
8 Nevada Bar No. 1988
9 1125 Shadow Lane
10 Las Vegas, Nevada 89102
11 *Attorney for Plaintiff*

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I.**

14 **INTRODUCTION**

15 This case concerns violations of Brian Olsen's (Mr. Olsen") civil rights arising out of Boulder
16 City's and Defendant Johnson's unlawful arrest of Mr. Olsen on March 20, 2010.

17 In order to provide context to this case, it is imperative to understand the concept of sharing
18 sexually explicit images using digital technology. Although the verb "sext" has yet to be defined in
19 the Merriam Webster dictionary, "sexting" has been described as " the transfer of sexually explicit
20 photos via cell phone".¹ Undoubtedly, "sext" is an amalgamation of the phrases "sex" and "text",
21 which results in a phrase used to describe sending sexually explicit photographs by way of digital
22 means, such as text messaging. The Ninth Circuit has also recognized the existence of "sexting" in
23 contemporary society referring to "sext messages" as "salacious photos". See, Monge v. Maya
24 Magazines, Inc., 688 F.3d 1164 (9th Cir. 2012).

25 Frequently, these "sexts" are self-photographs commonly referred to as "selfies." Time
26 Magazine named "selfie" a Top 10 Buzzword of 2012 as a result of the prevalence of self-photos
27 taken with smart phones in popular culture. *See, Time Magazine, December 4, 2012.* Sociologist Ben

28 ¹ "Sexting by High School Students: An Exploratory and Descriptive Study" *Archives of Sexual Behavior*
January 2013, Volume 42, Issue 1, pp. 15-21.

1 Agger Ph.D, has explained that “selfies” are commonly used by women in dating and mating.²

2 University of Utah Professor of clinical psychology, Donald S. Strassberg, Ph.D., has
3 described “sexting” as a “phenomena” amongst young people. Following a recent study of “sexting”
4 among young people, published in January of 2013, Dr. Stassburg determined that approximately 20%
5 of subjects had sent a sexually explicit photo of themselves to another using a cell phone and that
6 50% of male subjects had received a “sext.”*Id.* Lastly, Dr. Strassberg believes that the results from
7 his study can accurately generalize the rates of sexting in U.S. society as a whole. *Id.*

8 **II.**

9 **FACTS**

10 During March of 2010, Plaintiff, Brian Olsen (“Mr. Olsen”) was a student at Euphoria Institute
11 (“Euphoria”) studying cosmetology. *See Dkt# 34-1, Exhibit A - Deposition of Brian Olsen p. 10, Ins.*
12 *3-5.*³ Mr. Olsen was the only male student at Euphoria amongst approximately 180 to 200 women.
13 *Depo. of Olsen, p. 15, Ins. 9-17.* Among Mr. Olsen’s classmates at Euphoria was an individual named
14 Jessica Saur (“Ms. Saur”). *Id at p. 12, Ins. 17-18.*

15 During March of 2010, Mr. Olsen did not frequently check his email because the emails which
16 Mr. Olsen received generally consisted of spam, information from Sallie Mae concerning student
17 loans, or items sent from Euphoria. *Id at p. 25, Ins 19-25; p. 28, Ins. 18-25.* At some point I time, Mr
18 Olsen checked his email and noticed two emails which were out of the ordinary sent by Ms. Saur.
19 *Id at p. 25, Ins.19-25.* The emails were two separate photos with one nude photograph of Ms. Saur
20 in each email. *Id at p. 26, Ins. 1-2.* Mr. Olsen felt the photos were odd because he didn’t have a
21 relationship with Ms. Saur. *Id at p. 30, Ins. 21-24.* After Ms. Saur sent the explicit photographs to Mr.
22 Olsen, Mr. Olsen felt uncomfortable when he and Ms. Saur were assigned to the same group during
23 classes. *Id at p. 18, Ins. 7-16.* Mr. Olsen was not interested “at all” in dating or pursuing a relationship
24 with Ms. Saur. *Id at p. 30, Ins. 9-12.* Consequently, Mr. Olsen decided to act like nothing was wrong
25 after Ms. Saur “sexted” him. *Id at p. 28, Ins 4-12.* Mr. Olsen never replied to the “sexts”, nor did he

26
27 ² See, “Oversharing: Presentations of Self in the Internet Age”, Agger, Ben, Routledge Publishing (2012).

28 ³ In the interest of judicial economy, Plaintiff will rely upon the depositions which have been previously provided to the Court as Dkt. # 34-1 rather than burden the Court with duplicate copies of the same depositions.

1 share them with anyone else. *Id at p. 28, 12-17.* Long after the incident which serves as Defendants’
2 justification of Mr. Olsen’s unlawful arrest, Ms. Saur sent Mr. Olsen a “friend request” on social
3 networking website, Facebook. *Id at p. 17, lns 20-25; p. 31, lns. 11-14.*

4 During March of 2010, Mr. Olsen regularly borrowed phones of classmates at Euphoria to
5 arrange for transportation because he did not have his own phone. *Id at p. 20, lns. 1-9.* On March 9,
6 2010, Ms. Saur voluntarily gave Mr. Olsen her phone. *Id at p. 22, lns. 8-12.* Mr. Olsen then used the
7 phone to call his father. *Id at p. 23, lns. 6-7.* At no time did Mr. Olsen look through Ms. Saur’s
8 phone, nor did Ms. Olsen look through her photographs. *Id at p. 24, lns. 1-3.* After using the phone
9 Mr. Olsen returned it to Ms. Saur. *Id at p. 25, lns. 10-13.*

10 Eventually, Mr. Olsen was contacted by Defendant Nichols. *Id at p. 32, lns. 14-18.* Mr. Olsen
11 voluntarily went to the Henderson Police Department to be interrogated. *Id at p. 33, lns 15-17.* At that
12 time, Defendant Nichols accused Mr. Olsen of committing a crime by receiving Ms. Saur’s “sexts”
13 *Id at p. 40, lns. 8-14.* Mr. Olsen felt blindsided by Defendant Nichols accusations. *Id at p. 40, lns 8-*
14 *16.*

15 The next day, Defendant Nichols went to Euphoria. *Id at p. 42.* While Defendant Nichols was
16 at Euphoria, a ruse was orchestrated to remove Mr. Olsen from the classroom whereby Mr. Olsen
17 was called to the principal’s office under the guise of signing school paperwork. *Id at p. 42, ln 15*
18 *through p. 44, ln 11.* While, Mr, Olsen was out of the classroom, Defendant Nichols entered the
19 classroom and implied that Mr. Olsen was a pervert and a sexual predator. *Id.* Following Defendant
20 Nichol’s ruse at Euphoria, Mr. Olsen was treated as a pariah by his classmates. *Id at p. 59, lns. 9-13.*

21 On March 30, 2010, Mr. Olsen was arrested on on two charges of violating NRS 200.604,
22 Capturing the Image of the Private Area of Another. At that time, Defendant Johnson, arrived at Mr.
23 Olsen’s house and arrested Mr. Olsen without a warrant. *Id at p. 50, lns. 11-13.* Defendant Johnson
24 then drove Mr. Olsen to Railroad Pass Casino. *Id.* Railroad Pass Casino is located at the city limits
25 of Henderson and Boulder City. Defendant Johnson arrested Mr. Olsen because “Nichols asked
26 [Johnson] to help facilitate the arrest” or Mr. Olsen. *See Dkt.# 34-1, Exhibit C - Deposition Aaron*
27 *Johnson p. 8, lns 2-4.* Defendant Johnson conceded that he neither had knowledge of the facts of the
28 incident nor knowledge of the basis of probable cause. *Depo. of Johnson, p. 12, lns. 7-12.* Moreover,

1 Defendant Johnson admitted he made no inquiry concerning the basis of Mr. Olsen’s arrest. *Id at p.*
2 *12 20-25.* Johnson and Nichols served together in an inter-jurisdictional honor guard. *Id at p. 13,*
3 *8-9.* Lastly, Johnson was never disciplined as a result of the unlawful arrest of Mr. Olsen. *Id at p. 14,*
4 *21-24.*

5 Once Defendant Johnson and Mr. Olsen arrived at Railroad Pass Casino, Defendant Johnson
6 took Mr. Olsen to a parking lot high on the hill and waited for Defendant Nichols. *Depo. of Olsen,*
7 *p. 53, lns. 22-25 .* Once Defendant Nichols arrived, the Defendants took Mr. Olsen from the Boulder
8 City patrol car and ushered him into Defendant Nichols unmarked vehicle. *Id at p. 54, lns 1-3.* Mr.
9 Olson was then driven away to Henderson Jail. *Id.* Upon receiving the charges from Defendant
10 Nichols, the Clark County District Attorney refused to prosecute Mr. Olsen. *Exhibit 1 - Clark County*
11 *District Attorney refusal of charges.*

12 David R. Olsen, Esq., is Mr. Olsen’s father and the City Attorney of Boulder City. David
13 Olsen, Esq. is acting as Plaintiff’s expert witness in this case. Mr. Olsen is a career prosecutor with
14 approximately 25 years of experience prosecuting criminal cases in Nevada. My Olsen, through
15 Affidavit, has testified that “The Plaintiff’s arrest by the Defendants was made without a warrant and
16 without probable cause” Affidavit at paragraph *See Exhibit 2, Affidavit of David R. Olsen, Esq. at*
17 *paragraph 6(f).*

18 **III.**

19 **LOCAL RULE 56-1 UNCONTESTED FACTS**

20 The Defendant’s Motion for Summary Judgment (*Dkt. #34*), fails to comply with the District
21 of Nevada’s Local Rule 56-1 which provides, in part, that motions for summary judgment and
22 responses thereto “shall include a concise statement setting forth each fact material to the disposition
23 of the motion, which the party claims is or is not genuinely in issue.”

24 As a result of the Defendant’s Motion’s noncompliance with the Local Rules, the Plaintiff
25 msubmits that the Court should decline to entertain the Defendant’s Motion. Notwithstanding the
26 Defendant’s Motion’s deficiency, Mr. Olsen submits that the following facts are uncontested.

- 27 • Mr. Olsen did not take the sexually explicit photos of Jessica Sauer. *Dkt. #34-1, Exhibit B -*
28 *Deposition of Wayne Nichols, p. 38, lns. 18-23.*

1 • Jessica Sauer was in her “early twenties” at the time she took the nude photographs of herself.
2 *Depo of Nichols p. 11, lns 17.*

3 • Mr. Olsen was arrested at his home without a warrant. *Depo. of Johnson, p. 11, ln. 24 through*
4 *p. 12, ln. 6.*

5 • Clark County District Attorney declined to prosecute Mr. Olsen for a violation of NRS
6 200.604. *See Exhibit 1 and Dkt. #34, p. 9, lns. 21-25.*

7 • Defendant Johnson had no probable cause to arrest Mr. Olsen. Rather Defendant Johnson
8 relied upon Defendant Nichols representations concerning probable cause. *Depo. of Johnson,*
9 *p. 18, lns 2-16.*

10 • Defendant Johnson arrested Mr. Olsen because “Nichols asked [Johnson] to help facilitate the
11 arrest” or Mr. Olsen. *Depo. of Johnson, p. 8, lns 2-4.*

12 • Defendant Johnson conceded he neither had knowledge of the facts of the incident nor
13 knowledge of the basis of probable cause. *Depo. of Johnson, p. 12, lns. 7-12.*

14 • Defendant Johnson made no inquiry concerning the basis of Mr. Olsen’s arrest. *Depo. of*
15 *Johnson, p. 12, lns. 20-25.*

16 • Defendant Johnson and Defendant Nichols served together in an inter-jurisdictional honor
17 guard. *Depo. of Johnson, p. 13, lns. 8-9.*

18 • Defendant Johnson was never disciplined as a result of the unlawful arrest of Mr. Olsen *Depo.*
19 *of Johnson, p. 14, 21-24.*

20 IV.

21 ARGUMENT

22 A. STANDARD FOR MOTIONS FOR SUMMARY JUDGMENT

23 Summary judgment is appropriate only if all available facts show that there is no genuine issue
24 of material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P.
25 56. A genuine issue of fact exists if the evidence is such that a reasonable jury could resolve the issue
26 in either parties favor and "an issue is material if it is essential to the proper disposition of the claim."
27 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). The Court must examine
28 all of the evidence, and all reasonable inferences, in the light most favorable to the non-moving party.
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986).

1 If any genuine issue of material fact appears to the trial court, it is not the function of the trial
2 court to weigh evidence on that issue. Even if the weight or believability of the evidence is clearly
3 in favor of one party, the other party is entitled to a trial by jury to determine the facts. See, Anderson
4 v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986). The decision to grant summary
5 judgment will be reviewed *de novo* on appeal. Oliver v. Keller, 28 F.2d 623, 266 (9th Cir. 2002).

6 **B. CASES INVOLVING CIVIL RIGHTS VIOLATIONS ARE OFTEN INAPPROPRIATE FOR SUMMARY**
7 **JUDGMENT BECAUSE SUCH CASES INVOLVE QUESTIONS OF FACT FOR A JURY TO**
8 **DETERMINE**

9 Cases based on violations of constitutional rights are often inappropriate for summary
10 judgment. Wright, Miller and Kane, *Federal Practice and Procedure Civil*, 3d § 2732.2, at 152
11 (1998). This is because police misconduct cases almost always turn on a jury's credibility
12 determinations. Drummond v. City of Anaheim, 343 F.3d 1052, 1056 (9th Cir. 2003). "Further, the
13 very nature of the claims involved often presents factual issues that require summary judgment to be
14 denied." Id. "Credibility determinations, the weighing of evidence and the drawing of legitimate
15 inferences from the facts are jury functions, not those of a judge . . . the evidence of the non-movant
16 is to be believed, and all justifiable inferences are to be drawn in her favor." See Anderson, supra,
17 477 U.S. at 255, 106 S. Ct. at 513.

17 **C. DEFENDANT JOHNSON COMMITTED AN UNLAWFUL ARREST OF MR. OLSEN**

18 Probable cause exists when the acts and circumstances within the arresting officer's
19 knowledge are sufficient to warrant a prudent person to believe that a suspect has committed, is
20 committing, or is about to commit a crime. U.S. v. Puerta, 982 F.2d 1297, 1300 (9th Cir. 1992). In
21 § 1983 cases, **the existence of probable cause is generally a question of fact to be submitted to**
22 **a jury** McKenzie v. Lamb 738 F.2d 1005, 1008 (9th Cir. 1984)(emphasis added).

23 According to the statute upon which Mr. Olsen's arrest was based, NRS 200.604.8(b),
24 "capture" with respect to an image, means to videotape, photograph, film, record by any means or
25 broadcast. "Broadcast" is also defined in the statute and means to transmit electronically an image
26 with the intent that the image be viewed by any other person. See, NRS 200.604.8(a).

27 . . .

1 Defendant Nichols and Defendant Johnson did not have any evidence that Mr. Olsen
2 videotaped, photographed, filmed, or recorded by any other means, the nude image of Ms. Saur. The
3 only evidence available to Defendants was that Ms. Saur photographed herself in the nude, stored
4 the photos on her unsecured mobile telephone, and gave Mr. Olsen permission to use her mobile
5 telephone.

6 The elements of NRS 200.604.8 are clearly defined. If Mr. Olsen did not videotape,
7 photograph, film, record by any means or transmit electronically an image with the intent that the
8 image be viewed by any other person, there was no probable cause for Defendant Nichols and
9 Defendant Johnson to arrest Mr. Olsen. Simply stated, if essential elements of the charge are missing,
10 probable cause does not exist.

11 Additionally, the statute states that the “capturing” must be done “under circumstances in
12 which the other person has a reasonable expectation of privacy.” See, NRS 200.604.1(b). The
13 evidence that the Defendants had demonstrates that Ms. Saur had no reasonable expectation of
14 privacy in the photos because she took two nude photographs of herself and then stored them on an
15 unsecured photo application on her mobile telephone. Furthermore, the evidence in the Defendants’
16 possession, showed that Ms. Saur willingly allowed Mr. Olsen to use her mobile telephone. A normal
17 assumption of “reasonable expectation of privacy” would suggest that, if you want something kept
18 private, you should not provide it to a stranger. In this instant matter, it appears that Ms. Saur failed
19 to keep her images secure by electronically transmitting them to Mr. Olsen and then later regretted
20 her decision.

21 Furthermore, if Ms. Saur did not want the photographs to be seen, she shouldn’t have sent
22 them to the Plaintiff nor should she have allowed him to use her mobile telephone where the
23 photographs were easily accessible on an unsecured photo application. Ms. Saur failed to take any
24 protective measures to secure the privacy of the images on the mobile telephone, such as
25 password-protecting access to information. She had no reasonable expectation of privacy under the
26 circumstances. It is worth it to note that had Ms. Saur lost her mobile telephone, someone else could
27 have easily gained access to these images.

28 . . .

1 Nonetheless, Defendant Nichols and Defendant Johnson relied upon a single piece of
2 evidence, emails of photos sent from Ms. Saur’s phone to Mr. Olsen’s email address. Accordingly
3 the record in this case, taken in the light most favorable to Mr. Olsen, reflects the inescapable
4 conclusion that Mr. Olsen was arrested without probable cause. Such tenuous evidence between nude
5 “self-photos” taken by Saur and Mr. Olsen’s receipt of the same did not amount to the "reasonable
6 ground for belief of guilt" that Mr. Olsen captured the images necessary to establish probable cause
7 for arrest. Rather, the link between Ms. Saur’s taking of the photos and Mr. Olsen’s receipt of the
8 photos constituted mere suspicion. That slight suspicion did not give Boulder City Police Department
9 *carte blanche* to arrest any classmate of Ms. Saur’s to whom she may have “sexted”.

10 Lastly, the significance of Mr. Olsen’s status as the only male amongst approximately 180
11 women at Euphoria cannot be overlooked. To understand how that fact may be subconsciously
12 coloring our judgment in this situation, we must imagine the inverse scenario; that is, a situation
13 where there is one woman in a group of 180 men. We must honestly assess our belief concerning that
14 individual’s susceptibility to being taken advantage of, harassed, or singled-out. If we find that our
15 perception of those possibilities differs when genders are switched, then Plaintiff respectfully submits
16 that this case must proceed to a jury to determine the existence of probable cause.

17 Consequently, summary judgment is inappropriate because a reasonable jury could find that
18 the officers did not have probable cause to believe Mr. Olsen had captured an image of the private
19 area of another.

20 **D. DEFENDANT JOHNSON IS NOT ENTITLED TO QUALIFIED IMMUNITY**

21 Officers have no "discretion" to violate the Constitutional rights of citizens. See Owen v. City
22 of Independence, Mo., 445 U.S. 622, 100 S.Ct.1398 (1980). A Defendant is only entitled to qualified
23 immunity if the Defendant did not violate "clearly established rights" at the time of the conduct in
24 question. Harlow v. Fitzgerald, 457 U.S. 800, 817-818, 102 S.Ct. 2727 (1982). See Mattos v.
25 Agarano, 661 F.3d 433 (9th Cir. 2011)(holding that the law must be well settled).

26 ...
27 ...
28 ...

1 The test for qualified immunity is objective. The Defendant's actual purpose or state of mind
2 is not material. Whether rights were "clearly established" at the relevant time is determined in most
3 instances by looking at controlling published court decisions as of that time. See United States v.
4 Lanier, 520 U.S. 259, 269-71 (1997) (discussing qualified immunity in § 1983 and Bivens cases).

5 In determining whether to grant an officer qualified immunity for his actions, the Court
6 must first determine as a "threshold question," viewing the facts in the light most favorable to
7 plaintiff, whether the plaintiff has shown the deprivation of a constitutional right. If the answer
8 is in the affirmative, the inquiry then flows to whether the law was clearly established at the time
9 of the deprivation. Blanford v. Sacramento County, 406 F.3d 1110 (9th Cir. 2005); Brosseau v.
10 Haugen, 543 U.S. 194, 160 L.Ed.2d 583, 125 S. Ct. 596 (2004); Saucier v. Katz, 533 U.S. 194,
11 150 L.Ed.2d 272, 121 S. Ct. 2151 (2001). Qualified immunity insulates government agents from
12 liability "for civil damages insofar as their conduct does not violate clearly established statutory or
13 constitutional rights of which a reasonable person would have known." See Harlow v. Fitzgerald, 457
14 U.S. 800, 807(1982).

15 In the instant case, viewing the evidence most favorable to the Plaintiff, Mr. Olsen submits
16 that he satisfies the first prong because Mr. Olsen suffered a deprivation of his constitutional rights
17 when he was arrested without probable cause and transported to jail as analyzed above. A
18 determination that probable cause did not exist has a preclusive effect on the issue of qualified
19 immunity. Morgan v. Woessner, 997 F.2d 1244, 1260 (9th Cir. 1993)(obvious lack of probable cause
20 is dispositive of the qualified immunity question); Ganwich v. Knapp, 319 F.3d 1115, 1125 (9th Cir
21 2003)(no qualified immunity for officers who seized plaintiffs with no probable cause to arrest them).

22 Additionally, the right to be free from an arrest which is not supported by probable cause was
23 clearly established at the time of Mr. Olsen's arrest. Morgan v. Woessner, 997 F.2d 1244 (9th Cir.
24 1993). Because there existed published opinions prohibiting arrests not based upon probable before
25 the arrest of Mr. Olsen, any reasonable officer would have been aware that arrests not based upon
26 probable cause are unlawful. Consequently, Defendant Johnson is not entitled to qualified immunity.

27 . . .

28 . . .

1 **1. Defendant Johnson is not shielded by the fellow officer doctrine**

2 An arrest which depends upon information from other officers is unlawful if the other officer
3 does not possess probable cause for an arrest. Rogers v. Powell, 120 F.3d 446, 453 (3d Cir. 1997).
4 Additionally, The Ninth Circuit recently decided that an otherwise competent officer will be liable
5 under § 1983 when the officer makes an unreasonable decision or makes an unreasonable mistake as
6 to law or fact. Rosenbaum v. Washoe County, 663 F.3d 1071, 1079 (9th Cir. 2011).

7 In this case, Detective Johnson Defendant Johnson conceded he neither had knowledge of the
8 facts of the incident nor knowledge of the basis of probable cause. *Depo. of Johnson, p. 12, lns. 7-12.*
9 Moreover, Defendant Johnson made no inquiry concerning the basis of Mr. Olsen's arrest. *Id at p.*
10 *12, lns. 20-25.* Defendant's employ a logical fallacy to justify Defendant Johnson's blind reliance
11 upon Defendant Nichols' misrepresentation concerning probable cause, by arguing that Johnsons'
12 reliance was reasonable because it commonly occurs in law enforcement. This flawed logic is circular
13 reasoning. Defendant's argument itself begs a factual question of a jury; was Defendant Johnson's
14 reliance reasonable? According Plaintiff submits that summary judgment must be denied.

15 **E. BOULDER CITY IS LIABLE AS A RESULT OF ITS POLICY AND PRACTICE OF TOLERATING**
16 **FALSE ARRESTS**

17 A plaintiff can establish municipal liability under 42 U.S.C. § 1983 in one of three ways.
18 Gillette v. Delmore, 979 F.2d 1342, 1346 (9th Cir. 1992). "First, the plaintiff may prove that a city
19 employee committed the alleged constitutional violation pursuant to a formal government policy or
20 a longstanding practice or custom which constitutes the standard operating procedure of the local
21 governmental entity." Id. "Second, the plaintiff may establish that the individual who committed the
22 constitutional tort was an official with 'final policy-making authority' and that the challenge action
23 itself thus constituted an act of official governmental policy." Id. (citing Pembaur v. City of
24 Cincinnati, 475 U.S. 469, 480-81 (1986)). "Third, the plaintiff may prove that an official with final
25 policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for
26 it. Id. at 1346-47 (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988)). Here, Plaintiff
27 asserts municipal liability based upon two of the above theories: (1) the existence of municipal
28 policies that caused a constitutional harm, and (2) the City's ratification of the Officers'

1 unconstitutional conduct.

2 **1. Policy or Custom**

3 A local government entity may be held liable pursuant to 42 U.S.C. § 1983 where the alleged
4 constitutional tort was inflicted in the execution of the entity's (1) policy or (2) custom. Monell v.
5 Dept. of Social Services, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36 (1978). In order to avoid
6 summary judgment, Plaintiff need only show that there is a question of fact regarding whether there
7 is a city custom or policy that caused the constitutional deprivation. See Chew v. Gates, 27 F.3d
8 1432, 1444 (9th Cir. 1994)(city may be liable when its policy is the moving force behind the
9 constitutional violation). For purposes of proving a Monell claim, a custom or practice can be
10 supported by evidence of repeated constitutional violations which went uninvestigated and for which
11 the errant municipal officers went unpunished. Hunter v. County Of Sacramento, 652 F.3d 1225, 1236
12 (9th Cir. 2011). Additionally, a policy or custom of constitutional violations may be proved by
13 subsequent acts. See Larez v. City of Los Angeles, 946 F.2d 630 (9th Cir. 1991)(Court relied upon
14 evidence of subsequent acts in holding police chief liable in his individual and official capacities)
15 and Henry v. The County of Shasta, 132 F.3d 512 (9th Cir. 1997)(Holding, in part, that post-event
16 evidence is not only admissible for proving existence of municipal defendant's policy or custom to
17 violate federal rights in § 1983 actions, but is also highly probative to that inquiry).

18 In the case at hand, the Complaint states a plausible theory of municipal liability because
19 Boulder City Police Department has a multiplicity of unconstitutional policies including : making
20 warrantless arrests without probable cause, failing to adequately discipline officers thereby fostering
21 the belief amongst officers that they can violate the rights of persons such as the Plaintiff in this action
22 with impunity, and that such conduct will not adversely affect their opportunities for promotion and
23 other employment benefits; ignoring and failing to properly and adequately investigate and discipline
24 unconstitutional or unlawful police activity; allowing, tolerating, and encouraging a "code of silence"
25 among law enforcement officers and police department personnel, whereby an officer or member of
26 the department does not provide adverse information against a fellow officer or member of the
27 department; and, tolerating inadequate, deficient, and improper procedures for handling, investigating,
28 and reviewing complaints of citizens. The existence of each of these unconstitutional policies is a

1 question of fact which precludes summary judgment.

2 2. **Ratification**

3 “Ordinarily, ratification is a question for the jury.” Christie v. Iopa, 176 F.3d 1231, 1238-39
4 (9th Cir. 1999). A single decision by a municipal official that ratifies unconstitutional conduct may
5 be sufficient to trigger section 1983 liability if that official has “final policymaking authority.”
6 Pembaur, 475 U.S. at 481/83; Gillette, 979 F.2d at 1347.⁴

7 The Ninth Circuit distinguishes between affirmative or deliberate conduct by a policymaker,
8 which constitutes ratification, and mere acquiescence, which is insufficient to establish municipal
9 liability by ratification. See Gillette. in Fuller v. City of Oakland, 47 F.3d 1522, 1534 (9th Cir. 1995),
10 the court found section 1983 municipal liability where a police chief ratified an unconstitutional
11 investigation by expressly “approv[ing] both of the propriety of the investigation and the reports
12 conclusions.” See Christie, 176 F.3d at 1240 (finding municipal liability via ratification where
13 prosecutor “affirmatively approved” of alleged constitutional violations).

14 In the case at hand there can be no doubt that Boulder City ratified Defendant Johnson’s
15 unconstitutional conduct because the City absolved Johnson of any wrongdoing. Additionally, the
16 City ratified Defendant Johnson’s conduct by failing to discipline him or take any corrective measures
17 whatsoever. Defendants cursory and conclusory argument that Plaintiff cannot prove municipal
18 liability because Defendants’ believe the Plaintiff has not produced evidence of unconstitutional
19 policies during discovery misapprehends the doctrine of ratification. Consequently, Boulder City is
20 not entitled to summary judgment because ratification is a question for the jury.

21 **F. BOULDER CITY IS NOT IMMUNE FROM MR. OLSEN’S STATE TORT CLAIMS**

22 Plaintiff alleged state law claims of Intentional Infliction of Mental Distress, False
23 Imprisonment, and Malicious Prosecution against the Officer and the City under the doctrine of
24 *respondeat superior*. *Respondeat Superior* is an acceptable theory for state tort claims. In addition,
25

26 ⁴ It should be noted that the Plaintiff need not establish an existing unconstitutional
27 municipal policy to proceed against the City on the theory of ratification. See Christie v. Iopa,
28 176 F.3d 1231, 1238 (9th Cir. 1999)(“A municipality also can be liable for an isolated
constitutional violation if the final policymaker ‘ratified’ a subordinate’s actions.”)

1 the state tort claims favor a waiver of immunity. Hagblom v. State Director of Motor Vehicles, 93
2 Nev. 599, 571 P.2d 1172 (1977).

3 NRS 41.032 provides immunity to officers and municipalities when a suit is:

4 Based upon an act or omission of an officer... *exercising due care*, in
5 the execution of a statute or regulation,...if the statute or regulation has
6 not been declared invalid by a court of competent jurisdictional or
7 based upon the exercise or performance or the failure to exercise or
8 perform a discretionary function or duty on the part of the state or any
9 of its... Political subdivisions or of any officer..., whether or not the
10 discretion involved is abused.
11 Id. (*emphasis added*).

12 The Nevada Supreme Court has held that NRS 41.032 does not provide discretionary
13 immunity from liability in all cases. Williams v. City of North Las Vegas, 91 Nev. 622, 541 P.2d 652
14 (1975). The purpose of Nevada's waiver of sovereign immunity is to "compensate victims of
15 government negligence in circumstances like those in which victims of private negligence would be
16 compensated." Martinez v. Maruszczak, 168 P.3d 720, 727 (Nev. 2007).

17 Pursuant to Maruszczak, the court held the decisions of state actors are entitled to
18 discretionary act immunity under a two prong test, if the decision (1) involves an element of
19 individual judgment or choice and (2) is based on considerations of social, economic, or political
20 policy. Id. at 727. The Nevada Supreme Court clarified that "decisions at all levels of government,
21 including frequent or routine decisions, may be protected by discretionary-act immunity, if the
22 decisions require analysis of government policy concerns." Id. at 729. The Nevada Supreme Court
23 cautioned that "discretionary decisions that fail to meet the second criterion of this test remain
24 unprotected by NRS 41.032(2)'s discretionary-act immunity." Id.

25 The Nevada Supreme Court further addressed when acts are "discretionary" and should be
26 given immunity and when they are not protected in Butler ex rel. Biller v. Bayer, 168 P.3d 1055, 1067
27 (Nev. 2007). Butler involved an inmate that was attacked and beaten by other inmates resulting in
28 severe physical and mental disabilities and impairments. The court looked at whether the government
and their employees were entitled to immunity under NRS 41.032. In addressing what matters are
discretionary, the court found that the Defendants in Butler who made the decision to parole the
Plaintiff found the "overarching prison policies for inmate release are policy decisions that require

1 analysis of multiple social, economic, efficiency, and planning concerns," which were entitled to
2 discretionary immunity. Butler at 1067.

3 In Butler the court also found in contrast, that the Defendant's conduct in placing a severely
4 disabled parolee in the care of an individual whose home needed and lacked sufficient
5 accommodations required the exercise of judgment or choice, but this decision was not based on the
6 consideration of any social, economic, or political policy. Id. Accordingly, the Defendants in Butler
7 made the decision to leave the disabled inmate at his girlfriend's residence "despite the obvious lack
8 of preparation" which action was not entitled to discretionary act immunity. Id.

9 In the present case, given the totality of these circumstances the officers and City's actions
10 were not based upon any consideration of any social, economic, or political policy as set forth in
11 Maruszczak and Butler, *supra*. The Maruszczak case adopts the federal standard for addressing
12 governmental immunity and provides that federal cases may be used as reference in determining the
13 issue of whether the act or acts are discretionary. In United States v. Gaubert, 499 U.S. 315, 322 (U.S.
14 1991) the Supreme Court reiterated that "it is the nature of the conduct, rather than the status of the
15 actor" that governs whether the exception applies. (citing United States v. S. A. Empresa De Viacao
16 Aerea Rio Grandense (yang Airlines), 467 U.S. 797, 813 (U.S. 1984) See, Berkovitz v. United States,
17 486 U.S. 531, 539, 108 S. Ct. 1954(1988).

18 In Garcia v. United States, 826 F.2d 806, 809 (9th Cir. Ariz. 1987), a Federal Tort Claims Act
19 (FTCA) case involving allegations of excessive force by a border patrol officer, the court found
20 government action is discretionary if the action is "of the nature and quality that Congress intended
21 to shield from tort liability." citing Begay v. United States, 768 F.2d 1059, 1064 (9th Cir. 1985),
22 quoting United States v. S. A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S.
23 797, 81 L. Ed. 2d 660, 104 S. Ct. 2755 (1984). The court in Garcia went on to state: "While law
24 enforcement involves exercise of a certain amount of discretion on the part of individual officers,
25 such decisions do not involve the sort of generalized social, economic and political policy choices that
26 Congress intended to exempt from tort liability." (Emphasis added) Garcia at 809. In this case, falsely
27 arresting an individual with absolutely no knowledge of the basis of probable cause, nor any
28 knowledge of the facts of the alleged offense does not involve any social, economic and political

1 policy to shield a government official from liability. Likewise, participation in a clandestine operation
2 of driving a citizen to city limits and handing that person over to be jailed lacks consideration of
3 social, economic and political policy. Accordingly, Boulder City and Defendant Johnson are not
4 entitled to immunity for the state torts which they committed, as analyzed below.

5 **1. IIED**

6 The elements of an intentional infliction of emotional distress (“IIED”) claim are “(1) extreme
7 and outrageous conduct with either the intention of, or reckless disregard for, causing emotional
8 distress, (2) the plaintiff’s having suffered severe or extreme emotional distress and (3) actual or
9 proximate causation.” Star v. Rabello, 97 Nev. 124, 625 P.2d 90, 91-92 (Nev. 1981)

10 Here, the Defendant intentionally and negligently inflicted emotional distress upon Mr. Olsen
11 by arresting Mr. Olsen without probable cause. Boulder City had a duty to not effectuate arrests
12 without probable cause. Instead, the County engaged in a series of actions to vex, harass and annoy
13 Mr. Olsen by arresting Mr. Olsen without probable cause. Arresting an individual without probable
14 caused transcends all bounds of decency tolerated in a civilized society. As a result of the arrest, Mr.
15 Olsen suffered emotional distress and was treated like a pariah by his classmate. Therefore, a
16 reasonable jury could find that the County’s conduct was outrageous and engaged in reckless
17 disregard for causing Mr. Olsen emotional distress.

18 **2. False Imprisonment**

19 An individual is liable for the tort of false imprisonment if: (1) he or she act intending to
20 confine the other or a third person within boundaries fixed by the actor; (2) his or her acts directly or
21 indirectly results in such a confinement of the other; and (3) the other is conscious of the confinement
22 or is harmed by it. Switzer v. Rivera, 174 F. Supp. 2d 1097, 1110 (D. Nev. 2001).

23 In order to prove false arrest in a false imprisonment action, plaintiff must show that the defendant
24 instigated or effected an unlawful arrest. Nau v. Sellman, 104 Nev. 248, 757 P.2d 358 (1988).

25 Here, the record demonstrates that Defendant Johnson had no knowledge of probable cause
26 to arrest Mr. Olsen. Nonetheless, Defendant Johnson went to Mr. Olsen’s residence and handcuffed
27 Mr. Olsen. Johnson then seized Mr. Olsen and intentionally confined Mr. Olsen within his patrol
28 vehicle. Mr. Olsen was harmed by Defendant Johnson’s false imprisonment because Mr. Olsen

1 suffered a deprivation of his liberty and violations of his constitutional rights. Therefore, the moving
2 Defendants are not entitled to summary judgment for the torts they have committed.

3 **3. Malicious Prosecution**

4 The elements of a malicious prosecution cause of action are: (1) Defendant initiated, procured
5 the institution of, or actively participated in the continuation of a criminal proceeding against plaintiff;
6 (2) Defendant lacked probable cause to commence that proceeding; (3) Defendant acted with malice;
7 (4) The prior proceeding was terminated; and (5) Plaintiff sustained damages. LaMantia v. Redisi,
8 118 Nev. 27, 38 P.3d 877 (2002).

9 In its' analysis of malicious prosecution under the Fourth Amendment, the Ninth Circuit
10 explained that a police officer may be liable under a theory of malicious prosecution theory for filing
11 false charges or providing false information to the prosecuting attorney when the officer is sufficiently
12 involved with the prosecution that it may be said he initiated the prosecution Awabdy v. City of
13 Adelanto, 368 F.3d 1062 (9th Cir. 2004).

14 There exists a question of fact as to whether Johnson acted with malice. In Countrywide Home
15 Loans, Inc. v. Thitchener, 192 P.3d 243, 252 (Nev. 2008) the court explained that malice may be
16 implied when "conduct which is intended to injure a person or despicable conduct which is engaged
17 in with a conscious disregard of the rights or safety of others." "'Oppression' means despicable
18 conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of
19 the person." The court went on to state that both definitions utilize conscious disregard of a person's
20 rights as a common mental element, which in turn is defined as "the knowledge of the probable
21 harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those
22 consequences." (Id).

23 In the case at hand, Defendants initiated the process of criminal proceeding against the
24 plaintiff by arresting him and passing him off to Defendant Nichols. Additionally, the criminal
25 charges were terminated in plaintiffs' favor when the Clark County District Attorney declined to
26 prosecute the charges against Mr. Olsen. *Exhibit 1*.

27 Summary judgment cannot be granted on Mr. Olsen's claim for Malicious Prosecution
28 because there exists a question of fact as to whether Johnson had any probable cause to arrest Mr.

1 Olsen when Johnson asked no questions of Defendant Nichols whatsoever. The bedrock principle of
2 a malicious prosecution claim is that one who causes or triggers a charge to be filed may be sued for
3 malicious prosecution. In Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L. Ed. 2d 561 (1976) the
4 Court used the term of the “moving force” in the context of a malicious prosecution in a 42 U.S.C.
5 1983 action. That means that the fact that Johnson acted at the direction of Nichols should not insulate
6 Johnson from liability. In Catrone v. 105 Casino Corp., 82 Nev. 166 414 P.2d 106 (1966), the
7 Supreme Court approved the rule that a person who maliciously procures prosecution by a third
8 person is as liable as if he had instituted the criminal proceeding himself.

9 V.

10 **CONCLUSION**

11 Plaintiff respectfully submits that when the evidence is construed in light most favorable to
12 Mr. Olsen, there is no basis for a trier of fact to conclude that there was probable cause to arrest Mr.
13 Olsen. In light of the foregoing, Plaintiff requests that this Honorable Court deny Defendants’ Motion
14 for Summary Judgment and allow Plaintiff to proceed to trial and prove his causes of action.

15 DATED this 23rd day of August, 2013.

16 POTTER LAW OFFICES

17 By /s/ Cal J. Potter, III, Esq.
18 CAL J. POTTER, III, ESQ.
19 Nevada Bar No. 1988
20 1125 Shadow Lane
21 Las Vegas, Nevada 89102
22 *Attorney for Plaintiff*
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of POTTER LAW OFFICES, and that, on the 15th day of June, 2012, I filed and served through the CM/ECF electronic filing service a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE AND OPPOSITION TO DEFENDANTS BOULDER CITY AND OFFICER JOHNSON'S MOTION FOR SUMMARY JUDGMENT** as follows:

Nancy Savage, Esq.
CITY OF HENDERSON
240 Water Street
Henderson, NV 89015
Ph: (702) 267-1200
Fax: (702) 267-1201
*Attorney for Defendant City of Henderson
and Detective Nichols*

Craig R. Anderson, Esq.
MARQUIS, AURBACH, COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
Ph: (702) 382-0711
Fax: (702) 856-8970
*Attorney for City of Boulder City
and Officer Johnson*

/s/ Jenna Enrico
An Employee of Potter Law Offices

Exhibit 1

Exhibit 1

CLARK County DA 4/1/2010 3:37:14 PM PAGE 001/001 Fax Server
TO:Henderson, Police Department COMPANY:Henderson Police Dept.

Arrested: 03/30/10
Submitted: 04/01/10

NOTICE OF DENIAL OF REQUEST
CLARK COUNTY DISTRICT ATTORNEY

TO: HPD
Det. NICHOLS #1242

DATE: April 1, 2010

YOUR DR#: 1005919

DA FILE #: 10FH0685X/TK5

STATE vs.

OLSEN, Brian David #1864656

CHARGE: CAPT PRIV IMG OF ANOTHER

REASON FOR DENIAL

DENIED, THE FACTS DO NOT MEET THE ELEMENTS OF NRS 200.604.

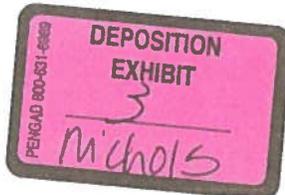
DISTRICT ATTORNEY

BY: Ronald Bloxham/cb
Chief Deputy

DISTRIBUTION: Addressee D.A. SCOPE Metro Jail

*cc: Sgt. Denison
Lt. Richardson
Records*

[Handwritten initials]



HEN000014

Exhibit 2

Exhibit 2

AFFIDAVIT OF DAVID R. OLSEN, ESQ.

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

DAVID R. OLSEN, ESQ., being first duly sworn upon oath, deposes and states:

1. Your Affiant is an attorney duly licensed to practice law in the State of Nevada since 1988 and my bar number is 3555;
2. Your Affiant was retained as the expert witness in Olsen v. City of Henderson, et al., case number 2:12-cv-00543-JCM-PAL;
3. Your Affiant is by training, background, and experience knowledgeable and capable to render an opinion regarding the wrongful arrest and civil rights violations of Brian Olsen;
4. Your Affiant reviewed the following materials in preparation of this Affidavit and previous report:
 - a. First Amended Complaint
 - b. Defendant City of Boulder City and Officer Johnson's Answer to First Amended Complaint
 - c. Defendant City of Henderson and Detective Nichols' Answer to First Amended Complaint
 - d. Deposition of Brian Olsen
 - e. Deposition of Detective Wayne Nichols
 - f. Deposition of Officer Aaron Johnson
 - g. Affidavit of Arrest
5. That based on the materials reviewed by your Affiant, I provide the following facts:
 - a. On March 30, 2010, at about 3:30 p.m., the Plaintiff, Brian Olsen (hereinafter "Mr. Olsen" or "Plaintiff") was arrested by Defendant Detective Nichols of the City of Henderson, Henderson Police Department and Defendant Officer Johnson of the City of Boulder City Police

1 Department on two charges of violating NRS 200.604, Capturing the
2 Image of the Private Area of Another. The arrest was made without a
3 warrant.

- 4 b. The Plaintiff was released on his own recognizance the next day (March
5 31, 2010 by Judge George). Detective Nichols knew that two significant
6 pieces of evidence were missing from his investigation. He knew that he
7 had no evidence that Mr. Olsen had “captured” the image of another
8 person as that term is defined in the statute. He also knew that the alleged
9 victim had no reasonable expectation of privacy.
- 10 c. According to NRS 200.604.8(b), “capture” with respect to an image,
11 means to videotape, photograph, film, record by any means or broadcast.
12 “Broadcast” is also defined in the statute and means to transmit
13 electronically an image with the intent that the image be viewed by any
14 other person. See, NRS 200.604.8(a).
- 15 d. Probable cause exists when the acts and circumstances within the arresting
16 officer’s knowledge are sufficient to warrant a prudent person to believe
17 that a suspect has committed, is committing, or is about to commit a
18 crime. U.S. v. Puerta, 982 F.2d 1297, 1300 (9th Cir. 1992). If essential
19 elements of the charge are missing, probable cause does not exist. The
20 warrantless arrest of Mr. Olsen occurred at his home in the absence of
21 probable cause.
- 22 e. The images which the Defendants allege Plaintiff captured were two
23 photographs saved and stored on an unsecured application on the mobile
24 telephone of a young woman, Jessica Saur. Plaintiff contends that the
25 images on the mobile telephone appear to have been taken by Ms. Saur
26 herself as she is standing nude in front of a mirror holding the mobile
27 telephone.

1 f. According to the allegations made by the young woman, she allowed Mr.
2 Olsen to use her mobile telephone and at that time, the photographs that
3 she had taken of herself were allegedly electronically transmitted by the
4 Plaintiff to his personal e-mail address.

5 g. Detective Nichols and Officer Johnson did not have any evidence that Mr.
6 Olsen videotaped, photographed, filmed, or recorded by any other means,
7 the nude image of the young woman. The only clear evidence available
8 appears to be that Ms. Saur photographed herself in the nude, stored the
9 photos on her unsecured mobile telephone, and gave Mr. Olsen permission
10 to use her mobile telephone.

11 h. There is evidence that the two nude photographs were transmitted
12 electronically to Mr. Olsen's personal e-mail address. However, the
13 Defendants did not have any evidence that confirmed that Mr. Olsen had
14 sent the photographs to his e-mail address. On the contrary, the Plaintiff
15 informed the Defendants that the images of Ms. Saur were willingly sent
16 to his personal e-mail address by Ms. Saur herself.

17 6. That based on the materials reviewed by your Affiant, I provide the following
18 opinions:

19 a. The elements of NRS 200.604.8 are clearly defined. If Mr. Olsen did not
20 videotape, photograph, film, record by any means or transmit
21 electronically an image with the intent that the image be viewed by any
22 other person, there was no probable cause for Detective Nichols and
23 Officer Johnson to arrest the Plaintiff.

24 b. Additionally, the statute states that the "capturing" must be done "under
25 circumstances in which the other person has a reasonable expectation of
26 privacy." See, NRS 200.604.1(b). The evidence that the Defendants had
27 demonstrates, quite clearly, that the young woman took two nude
28 photographs of herself and that she stored them on an unsecured photo

1 application on her mobile telephone. Furthermore, the evidence in the
2 Defendants' possession, showed that Ms. Saur willingly allowed Mr.
3 Olsen to use her mobile telephone. A normal assumption of "reasonable
4 expectation of privacy" would suggest that, if you want something kept
5 private, you should not provide it to a stranger. In this instant matter, it
6 appears that Ms. Saur failed to keep her images secure by electronically
7 transmitting them to Mr. Olsen and then later regretted her decision.

8 c. Furthermore, if Ms. Saur did not want the photographs to be seen, she
9 shouldn't have sent them to the Plaintiff nor should she have allowed him
10 to use her mobile telephone where the photographs were easily accessible
11 on an unsecured photo application. The young woman failed to take any
12 protective measures to secure the privacy of the images on the mobile
13 telephone, such as password-protecting access to information. She had no
14 reasonable expectation of privacy under the circumstances. It is worth it to
15 note that had Ms. Saur lost her mobile telephone, someone else could have
16 easily gained access to these images.

17 d. When the case was submitted to the Clark County District Attorney for
18 prosecution, it appears that the District Attorney noted that the allegations
19 against Mr. Olsen could not be proven because there was no evidence that
20 the Plaintiff "captured" anything nor that Mr. Olsen even sent the
21 electronic transmission. There was also significant evidence that the
22 alleged victim had no reasonable expectation of privacy under the facts of
23 the case.

24 c. Thereafter, the District Attorney notified Mr. Olsen that no criminal
25 charges would be filed and the Henderson justice Court vacated further
26 action against the Defendant

27 ///

28 ///

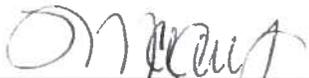
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f. The Plaintiff's arrest by the Defendants was made without a warrant and without probable cause.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


DAVID R. OLSEN, ESQ.

SUBSCRIBED AND SWORN to before me this 22 day of August, 2013.


NOTARY PUBLIC in and for said County and State

